Filed 10/25/02 In re Andrew C. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re ANDREW C. et al., Persons Coming Under the Juvenile Court Law.	B157657 (Los Angeles County Super. Ct. No. CK42304)
DEPARTMENT OF CHILDREN AND FAMILY SERVICES, LOS ANGELES COUNTY, Plaintiff and Respondent, v. SHIRLEE M., Objector and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Margaret S. Henry, Judge. Affirmed.

Joseph T. Tavano, under appointment by the Court of Appeal, for Objector and Appellant.

Lloyd W. Pellman, County Counsel, and Doraine F. Meyer, Senior Deputy County Counsel for Plaintiff and Respondent.

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Shirlee M. appeals an order terminating her parental rights (Welf. & Inst. Code, § 366.26) to her three children, Andrew, April and A. She contends she did not receive adequate notice of the termination hearing and is entitled to per se reversal. She further contends that the denial of visitation with her children throughout the period of her incarceration in violation of the trial court's orders also mandates reversal.

The record does not support a finding that appellant received notice of the termination hearing in accordance with Welfare and Institutions Code[1] section 366.23, subdivision (a). Although the error constitutes a due process violation under *In re Phillip F.* (2000) 78 Cal.App.4th 250, 258-259, we review it under the prejudice standard of harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18. (*In re Angela C.* (2002) 99 Cal.App.4th 389, 391.) Pursuant to this standard, we conclude the error was harmless. We further hold that the Department of Children and Family Services' failure to facilitate visitation, albeit a gross dereliction of duty, does not mandate reversal under the facts of this case. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 18, 2000 11-year-old Andrew ran away from home after suffering severe abuse and torture at the hands of his mother, appellant Shirlee M., and stepfather, Roger M.[2] The abuse included repeatedly calling Andrew a "fag" and "punishing" him by binding his hands, feet and torso with electrical cords and ropes, forcing him to sit in a tub of cold water for six to eight hours through the night several

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] Roger M. is Andrew's stepfather, and the biological father of April and A. The whereabouts of Andrew's natural father are unknown. Roger M. is not a party to this appeal.

times a week over a period of three months, and sending him to school dressed in girls' clothes and a diaper. On one occasion Shirlee and Roger bound Andrew's hands, legs and torso and suspended him from a pipe in the ceiling for over a half-hour. When Andrew cried out to his mother for help, she responded by covering his mouth with masking tape. When he was released, Andrew's hands were numb and he could not move his left arm. Two days later, his mother sought medical help, but lied to the doctor about what had happened to cause her son's injury. Afterwards, Shirlee and Roger threatened to repeat the punishment if Andrew told anyone about it.

After injuring his arm, Shirlee and Roger stopped tying Andrew up, but Shirlee allowed Roger to punch, kick, and beat her son with a belt.

After two years Andrew finally ran away and was detained. Authorities observed scars and marks on Andrew's upper arm and body and a "severely damaged" left hand. Andrew had suffered permanent nerve damage to his left arm as a result of being suspended in the air by a rope. Sheriff's deputies went to the family home, arrested Shirlee and Roger, and took their one-year-old daughter, April, into protective custody.

When confronted by authorities, Shirlee and Roger admitted the abuse. But Shirlee blamed Andrew, declaring, "I have had it with my son[]. I tried every way to reach him. . . . He's a liar, he steals, he's molested a family member, he's [abusive] back, he's uncontrollable, very [manipulative]. [In February] Andrew was out of control. He tried to kiss a boy. I was very mad at him, that I lost control[] of myself." Shirlee told law enforcement that she approved of the methods of punishment and had been present when Andrew was being punished. She claimed that Andrew was being disciplined for lying about sexually molesting another child, lying about his sexual conduct with a girl and his female cousin, and for recently kissing another boy.

On April 20, 2000 the Department of Children and Family Services (DCFS) filed a section 300 petition under subdivisions (a), (b), (c), (g), (i), and (j) on behalf of Andrew and April. DCFS indicated that it would seek an order for no reunification

services pursuant to section 361.5. The following day, the court ordered the children detained, and denied visits until mother and stepfather could be brought in from custody. On April 27, 2000, Shirlee and Roger appeared in custody, and the court ordered monitored visits.

Shirlee and Roger remained incarcerated pending trial on felony child abuse charges. May 7, 2000, Shirlee gave birth to A., who was detained and placed with a maternal cousin.

On June 19, 2000 DCFS added A. in a second amended petition, and reported that the maternal aunt was willing to care for all three children on a long-term basis. DCFS recommended no reunification services for Shirlee or Roger pursuant to section 361.5, subdivision (e)(1). Counsel for Roger reported that despite the court's previous order for monitored visitation, the parents had had no visitation with the children. The court ordered DCFS to assist with and facilitate visits with the parents while they remained in custody.

On June 26, 2000 the court ordered all of the children placed with their maternal aunt in Vacaville, California.

On August 15, 2000 Shirlee and Roger entered no contest pleas to felony child abuse and corporal injury charges. Shirlee was later sentenced to two years in prison.

A psychologist appointed to evaluate Shirlee pursuant to Evidence Code section 730 reported that Shirlee demonstrated "almost no insight into the events leading to her incarceration and the abuse of her child." She accepted very little responsibility for what she had done to her son, and blamed Andrew for the abuse. She still expressed love for and a desire to remain married to Roger. The psychologist concluded that "the likelihood of successful treatment [of Shirlee] is extremely low."

On January 23, 2001 Shirlee appeared in custody. The court ordered a psychological evaluation of Andrew and ordered DCFS to interview Andrew to determine whether he desired reunification with his parents. Counsel reported that Shirlee still had had no visitation with the children. The court ordered DCFS to assist

with visits for Shirlee and to facilitate those visits by having the children's birth certificates available.

On March 13, 2001 DCFS reported that Andrew had unequivocally told two social workers on two separate occasions that he did not want to be reunited with his mother. Andrew's maternal aunt had also reported that "'Andrew has remained consistent about his feelings of not wanting to return to his mother. He does not want to see her or talk to her on the phone.'" In addition, Andrew told his therapist that his preference was to stay with his aunt over returning to his mother "even years down the road."

A psychological evaluation of Andrew pursuant to Evidence Code section 730 concluded that reunification with his mother would "traumatize [Andrew] all over again." It noted that Andrew "enjoys living with his aunt and uncle. He states he would 'feel safer' with them [than] with his mother, and he [has] indicated he clearly does not want to re-unite with her. He feels very betrayed by her . . . ." Andrew's therapist reported that he had made significant therapeutic progress and was doing very well in the care of his aunt and uncle.

On March 13, 2001 counsel again advised the court that Shirlee still had not had any visits with the children while in custody. The court again ordered DCFS to submit the children's birth certificates and to facilitate visitation with Shirlee.

On August 1, 2001, the day before the August 2, 2001 disposition hearing, DCFS informed the court that Shirlee had been paroled from Valley State Prison for Women on July 2, 2001, and remanded to the custody of the United States Immigration and Naturalization Service. She was being detained at the North Las Vegas Detention Center, located at 2200 Civic Center Drive, North Las Vegas, Nevada, 89030. DCFS further reported that at her last hearing on July 31, 2001, Shirlee was ordered deported to her native country of Belize, but the date of her deportation had not been set.

Shirlee did not appear at the August 2, 2001 disposition hearing, and the court denied her counsel's request for a continuance. The parties stipulated to counsel's statement of Shirlee's expected testimony had she been able to appear at the hearing. The court also received in evidence the court-ordered psychological report on Shirlee, the transcript of Andrew's testimony at the preliminary hearing in the criminal proceedings against his mother and stepfather, a letter with the envelope date-stamped July 20, 2000 from Andrew to his mother, and reports with attachments dated June 19, 2000, January 17, 2001, March 13, 2001, April 24, 2001, and August 2, 2001.

The court ordered no family reunification services for Shirlee or Roger pursuant to section 361.5, subdivisions (b)(6), (e), (h)(6), and former subdivision (b)(11) (now subdivision (b)(12)), and set a selection and implementation hearing pursuant to section 366.26 for November 29, 2001.

On August 6, 2001 a proof of service was prepared which indicated that notice of hearing pursuant to section 366.26 had been sent to Shirlee at the Central California Woman's Facility in Chowchilla. Thereafter, on October 9, 2001, notice of the November 29, 2001 selection and implementation hearing was sent via certified mail to Shirlee at the "North Las Vegas Detention Center 222 Constitution Way." A return receipt was signed and placed in the case file.

In its November 29, 2001 report DCFS stated that Andrew's maternal aunt and her husband wanted to adopt all three of the children.

The court continued the November 29, 2001 hearing to January 11, 2002 to provide proper notice to the fathers. Counsel for Shirlee made no objection to the court's finding that notice to Shirlee had been proper. On January 11, 2002 counsel again did not object to notice to Shirlee or otherwise indicate that notice was improper, but stated that she had a letter from her client objecting to termination of parental rights, and requested that the matter be put over for a contested hearing in March 2002. The court continued the selection and implementation hearing to March 4, 2002.

At the hearing on March 4, 2002, counsel announced that Shirlee had not received proper notice. The court found notice proper and denied counsel's request for a continuance.

Counsel then read a letter into the record from Shirlee dated February 25, 2002 in which Shirlee stated that she had been unable to contact counsel by phone, and had not received any court papers. She continued, "I am begging the court to please give me a chance to prove to them that I'm a loving mother. I'm not the person that you read in their reports. Please, get to know me as an individual, a person with feelings and concerns about my children—most importantly, a loving mother who loves her children dearly. My children are my life. I realize how precious the life of a child is. I miss my children so much that I hang on to every word and sound they make on the phone. I want to reach out to hold them so close to me and never let them go, to inhale their scents, watch how unique they are, to guide them and tell them how proud I am of them, the small things in life that I will not take for granted. I am very lucky to have such a beautiful family who loves and supports me, keeps me going. I thank you, God, every day for my family.

"In the event I lose my rights, I will continue to love my children. The love I have for my children, no court could ever take that away. That love is deep down in my heart, and runs through my soul. I will continue to shower my children with love and affection. I do hope the court takes into consideration my desire to be part of my children's lives.

"I want to thank you, my attorney, for reading my letter to the court, and I also want to thank the court for taking the time to listen."

Counsel argued that the court should not terminate Shirlee's parental rights, but instead implement a plan of legal guardianship.

The court found by clear and convincing evidence that the children were likely to be adopted, and that it would be detrimental to return them to their mother's care. The court terminated Shirlee's parental rights.

This appeal from the findings and "[o]rder of March 4, 2002—Termination of Parental Rights; selection and implementation of a permanent plan of adoption for all children" followed.

DISCUSSION

1. *Notice.*

DCFS acknowledges Shirlee was entitled to notice of both the original and continued section 366.26 hearings, (*In re Phillip F., supra*, 78 Cal.App.4th at pp. 258-259) and concedes that she "probably" did not receive the statutorily mandated notice. But DCFS contends that any failure to provide Shirlee actual notice of the continued hearing must be reviewed under the *Chapman* standard of harmless beyond a reasonable doubt. Under this standard, the error in this case does not require reversal. We agree.

In *In re Angela C.*, *supra*, 99 Cal.App.4th 389 (*Angela C.*), the court confronted the issue whether the failure to provide notice to a parent of a continued section 366.26 hearing mandates per se reversal. The court noted that when "[c]onfronted with constitutional error in dependency matters, other appellate courts have looked to the standards applied in criminal appeals." (*Id.* at p. 394.) It held, "[c]onstitutional error as a general rule does not automatically require reversal. In determining the effect of 'most constitutional errors,' appellate courts can properly apply a *Chapman* harmless error analysis. (*Arizona v. Fulminante* [(1991)] 499 U.S. [279,] 306.) . . . An error in the trial process itself does not require automatic reversal because a court may quantitatively assess such an error in the context of other evidence presented in order to determine whether the error was harmless beyond a reasonable doubt. (*Id.* at pp. 307-308.) In applying harmless error analysis to these many different constitutional violations, [*Fulminante*] explained the harmless error doctrine is 'essential to preserve the "principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the

criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.'" (*Id.* at p. 308.)" (*Angela C.*, at p. 394.)

On the other hand, "structural" constitutional error affects "'the framework within which the trial proceeds, rather than simply an error in the trial process itself' [and] defies analysis by a harmless error standard. (*Arizona v. Fulminante, supra*, 499 U.S. at pp. 309-310.) A structural error requires reversal without regard to the strength of the evidence or other circumstances. (*Id.* at p. 310.)" (*Angela C., supra*, 99 Cal.App.4th at p. 394.)

In *Angela C.* appellant had failed to appear for the originally scheduled section 366.26 hearing and was not given notice of the continued hearing. Concluding that the lack of notice was in the nature of a trial error, the court noted that appellant had notice of the dependency proceedings from the outset as well as an opportunity to be heard. She had received proper notice of the originally scheduled hearing and her failure to appear at that hearing merely affected the manner in which the juvenile court conducted the hearing. Since the court could have conducted an uncontested hearing on the original hearing date, the failure to notify appellant of the continued hearing date was harmless beyond a reasonable doubt. (*Angela C., supra*, 99 Cal.App.4th at p. 395.)

The circumstances of this case mandate the same conclusion. By the time of the section 366.26 hearing Shirlee was no longer in state prison, but was in federal custody outside of California. The juvenile court therefore had no jurisdiction to order her appearance in court. Strict compliance with the notice requirements of section 366.23 would therefore have made no difference in the proceedings. Shirlee was, however, represented by counsel at the section 366.26 selection and implementation hearing as she had been throughout the dependency proceedings. Her counsel read in open court Shirlee's letter to the court requesting that her parental rights not be terminated.

Given the fact that Shirlee could not have been present at the hearing in any event, but was represented by counsel who read Shirlee's letter to the court and was prepared to put on witnesses, "we can quantitatively assess the error in the context of other evidence presented in order to determine whether the error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante, supra,* 499 U.S. at pp. 307-308.)" (*Angela C., supra*, 99 Cal.App.4th at p. 395.) Accordingly, having reviewed the record as a whole under the *Chapman* standard, we find the failure to properly notify Shirlee of the section 366.26 hearing was in the nature of a "trial error" and was harmless beyond a reasonable doubt.

2. *The denial of visitation.*

Shirlee contends that because DCF never facilitated visitation between Shirlee and the children despite court orders to do so, she was unable to establish the exception under section 366.26, subdivision (c)(1)(A), and the order terminating parental rights must be reversed. While we are dismayed by DCFS's failure to comply with specific court orders to facilitate visitation, we cannot conclude on the facts of this case that Shirlee could have met her burden of proving that termination of her parental rights would be detrimental to the children.[3]

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[3] DCFS contends that since Shirlee appealed only the court's March 4, 2002 termination order, and not any visitation order, she may not now challenge DCFS's failure to facilitate visitation as ordered by the juvenile court, and urges us to dismiss that part of the appeal based on its own failure to facilitate the children's visitation with Shirlee during the entire period of her incarceration in direct violation of court orders. DCFS's argument is both disingenuous and misleading.

DCFS asserts "[a]ny lack of visitation because mother was incarcerated after the denial of family reunification services and prior to the section 366.26 hearing should have been appealed from separately. It is now final for all purposes." But the juvenile court expressly ordered DCFS to facilitate visitation on three occasions. There was never an order by the court denying visitation to Shirlee from which she could have appealed. There was only DCFS's direct contravention of court orders to facilitate visitation in apparent pursuit of its own agenda to "virtually assure[] the

We review the trial court's findings in support of its ruling terminating parental rights for substantial evidence. (*In re Cliffton B.* (2000) 81 Cal.App.4th 415, 424-425; *In re Derek W.* (1999) 73 Cal.App.4th 823, 827; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575-576 (*Autumn H.*).) We therefore consider the evidence "in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*Autumn H.*, at p. 576.) Applying this standard, we find substantial evidence supports the juvenile court's order terminating Shirlee's parental rights and not applying the exception to the preference for adoption set forth in section 366.26, subdivision (c)(1)(A) in this case.

Section 366.26, subdivision (c)(1) provides that if a child is likely to be adopted, "the court *shall* terminate parental rights and order the child placed for adoption," unless one of the statutory exceptions enumerated in subdivisions (c)(1)(A) through (D) applies. (§ 366.26, subd. (c)(1), italics added; *In re Keyonie R.* (1996) 42 Cal.App.4th 1569, 1573.) "If there is clear and convincing evidence that the child will be adopted, and there has been a previous determination that reunification services should be ended, termination of parental rights at the section 366.26 hearing is relatively automatic." (*In re Zacharia D.* (1993) 6 Cal.4th 435, 447.)

Subdivision (c)(1)(A) provides for an exception for termination of parental rights where "[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." It is the parent's burden to establish that termination of parental rights would be detrimental to the child under the exception. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1153.)

There are two prongs to the exception: the parent must have maintained regular visitation and contact with the minor, and the minor must benefit from a continuous

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erosion (and termination) of any meaningful relationship" between Shirlee and her children. (*In re Brittany S.* (1993) 17 Cal.App.4th 1399, 1407.)

relationship. As stated in *Autumn H., supra*, 27 Cal.App.4th at page 575: "[W]e interpret the 'benefit from continuing the [parent/child] relationship' exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." However, "when the court has not returned an adoptable child to the parent's custody and has terminated reunification services, adoption becomes the presumptive permanent plan and parental rights should ordinarily be terminated at the section 366.26 hearing. . . . Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

In this case, even if Shirlee had been able to maintain consistent visitation with her children, she could not have shown that termination of her parental rights would be detrimental to them in order to establish the exception. Unlike cases in which a mother's criminal conviction is unrelated to her fitness as a parent, Shirlee was incarcerated precisely because of the severe abuse she inflicted on her son. It is uncontroverted that for two years Shirlee and her husband subjected Andrew to extreme punishment that caused him to suffer long term if not permanent psychological and physical injuries.

There is no evidence that Shirlee ever accepted responsibility for her actions. Even after she was convicted, Shirlee continued to lay blame for the abuse on Andrew, and was unable "to understand the magnitude of harm she inflicted on her child, or her

responsibility for this harm." Indeed, even though Roger had received a significantly longer sentence than she, Shirlee expressed no "anger toward[] her husband for having harmed her son. [Rather, Shirlee] expressed anger at Andrew for not listening to his stepfather, again placing the blame on Andrew."

On this record we conclude that even with the limited visitation that might have been possible during Shirlee's incarceration in state prison, Shirlee would not have been able to carry her burden of establishing the exception under section 366.26, subdivision (c)(1)(A). Accordingly, the juvenile court did not err in not applying the exception for termination of parental rights under section 366.26, subdivision (c)(1)(A) and in ordering Shirlee's parental rights terminated.

DISPOSITION

The order of the juvenile court terminating parental rights is affirmed.

NOT FOR PUBLICATION.

_____, J.

DOI TODD

We concur:

_____, P.J.

BOREN

_____, J.

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